A **SHANTHI CHANDASAMY**

v.

SARAVANAN SUBRAMANIAM

B HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[ORIGINATING SUMMONS NO: S8-24-21-2009]
10 OCTOBER 2011

C ***FAMILY LAW:*** *Children - Custody - Application to vary court order - Whether defendant husband ('DH') proved there was material change in circumstances to justify variation - DH's non-compliance with court order - Whether in contempt of court - Welfare of child - Consideration of - Rebuttable presumption in cases of child below age of seven - Whether* D *rebutted - Law Reform (Marriage and Divorce) Act 1976, ss. 88(2), (3) & 96*

FAMILY LAW: *Custody - Welfare of child of paramount consideration - Application to vary court order - Whether there was material changes in circumstances to justify variation of court order - Whether defendant* E *husband proved that plaintiff wife was an unfit mother - Rebuttable presumption in cases of child below age of seven - Whether rebutted - Law Reform (Marriage and Divorce) Act 1976, ss. 88(2), (3) & 96*

An application ('encl. 26') was filed by the applicant/defendant F husband ('DH') for leave under s. 96 Law Reform (Marriage and Divorce) Act 1976 ('LRA') to vary the court order dated 31 March 2010 ('court order'), so that the right of custody, guardianship and control of the child, Savitaashri ('the child') aged five years' old be given to DH. The facts of this case arose in G relation to the respondent/plaintiff wife's ('PW') application in encl. 1 wherein the court had granted custody, care and control of the child to PW with reasonable access to DH. DH was then ordered to surrender the child to PW within 24 hours from the court order. However, DH failed to comply with the said court order H and as a result, PW filed committal proceedings against him. In this application, DH contended, *inter alia*, that (i) the child had always been cared by him and his mother and (ii) it would be traumatic to uproot the child by giving the child to PW. In determining whether the court should grant DH a variation of the I court order, the issue that came to the fore was whether there had been a material change in the circumstances to justify a variation of the said court order.

Held (dismissing DH's application ('encl 26') with costs):

(1) DH admitted in his affidavit that he intentionally did not hand over the child to PW because of her conduct in leaving the matrimonial home. This was a clear admission by DH of his non-compliance with the court order. Besides, this reason was only relevant to the consideration of the court for the decision in encl.1, *ie*, the court order, but not for the consideration of this application. Further, DH was not allowed to take the law into his own hands by deciding not to comply with the court order and continue to be in blatant disregard of the same. Hence, he was in contempt of court and should not be heard (*Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal*; refd). (paras 14, 15 & 18)

(2) The paramount consideration was the welfare of the child (s. 88(2) LRA). It was for the welfare of the child that she be taken care of by her own mother, *ie*, PW, rather than by her paternal grandmother. A paternal grandmother's love and care for the child can never be the same or more superior to that which can be given by a mother who has not been proven to be unfit in any manner whatsoever thus far. Further, it was for the welfare of the child to be under the custody of her mother and also to be with her younger sister who was with PW. It was not for the welfare of both children to be separated from each other and from the mother since both children were below seven years' old. (paras 20 & 23)

(3) DH had not rebutted the rebuttable presumption in s. 88(3) LRA that the child should be with her mother. DH had thus failed to prove this court that there had been a material change in the circumstances to justify a variation of the court order. (paras 11 & 22)

[Order accordingly].

Case(s) referred to:

Legasri Purana Chandran v. Sreepathy Ganapathy Krishnan Iyer [2010] 8 CLJ 208 HC ***(refd)***

Low Swee Siong v. Tan Siew Siew [2011] 9 CLJ 536 HC ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 88(2), (3), (4), 96
Rules of the High Court 1980, O. 52 r. 2

For the defendant husband/applicant - M J Ganesan; M/s J Ganesan Tajul Anuar & Co
For the plaintiff wife/respondent - P Gunalan; M/s S S Ruban & Assocs

Reported by Kumitha Abd Majid

JUDGMENT

Yeoh Wee Siam J:

[1] This is an appeal by the defendant husband ("the DH") against the whole of my decision made in chambers on 30 September 2011 regarding encl. 26.

Enclosure 26

[2] Enclosure 26 is the DH's application for:

(a) leave under s. 96 of the Law Reform (Marriage and Divorce) Act 1976 ("the LRA") to vary the court order dated 31 March 2010 so that the right of custody, guardianship and control of the child, Savitaashri, aged five years old, be given to the DH.

(b) the time and date to be fixed so that the DH and the plaintiff wife ("the PW") can have specific access to the two children.

(c) costs to be borne by both parties.

(d) any other relief as deemed just by the court.

Background Facts

[3] On 31 March 2010 the court, after hearing both parties, allowed the PW's application in encl. 1 and granted custody, care and control of the two children, Savitaashri a/p Saravanan (date of birth: 9 September 2006) ("the first child") and Janeshrii a/p Saravanan (date of birth: 13 December 2007) ("the second child") to the PW with reasonable access to the DH. The DH was ordered to surrender the first child to the PW within 24 hours from the date of the order. (At the time of the above order, the second child was already living with the PW.)

[4] The DH did not file any appeal against the court order dated 31 March 2010. Neither did the DH comply with the same court order.

[5] In the meantime, the PW filed two applications for committal proceedings against the DH for non-compliance with the court order dated 31 March 2010, namely:

(1) enclosure 17: for leave of the court to commence committal proceedings.

This was withdrawn by the PW and struck out by the court on 29 July 2010; and

(2) enclosure 34: for leave of the court to commence committal proceedings.

[6] This was granted by the court on 30 September 2011 ie, the same date as the court's decision on encl. 26.

Issue

[7] The issue is whether the court should grant the DH a variation of the court order dated 31 March 2010.

The Law

[8] Section 96 of the LRA provides as follows:

> 96. Power for court to vary orders for custody or maintenance.
>
> The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

[9] The question is whether there has been a material change in the circumstances to justify a variation of the court order dated 31 March 2010.

Decision

[10] I dismissed the DH's application for variation with costs of RM1,500 which has to be paid by the DH to the PW within 14 days from the date of the order.

Reasons for My Decision

[11] The DH failed to prove to this Honourable Court that there has been a material change in the circumstances to justify a variation of the court order dated 31 March 2010.

[12] The DH's grounds for the application are as follows:

(1) Since the time when the court gave custody, care and control (collectively to be referred to as "custody") of the first child to the PW, the PW did not take any steps to obtain custody of the child from the DH. The DH averred that straight after the court order dated 31 March 2010 was given, he had arranged with the PW to meet the first child at JUSCO, Cheras at 6pm each day for a week. However, the PW failed to turn up because she was busy.

[13] I do not think that the DH is telling the truth here. In para. 6(a) to (g) of the PW's Affidavit In Reply (encl. 32), the PW stated in full all the following steps that she had taken in order to obtain custody of the first child from the DH:

(a) the PW through her former solicitors, Messrs Nagarajan Peri & Co, had contacted the DH's solicitors from Jabatan Bantuan Guaman and informed them of the court order dated 31 March 2010 and requested the DH's solicitors to advise the DH to surrender the first child to the PW within 24 hours from the date of the court order. The PW and her solicitors were informed that the DH had acted roughly and stated that he would not surrender the first child to the PW;

(b) on 2 April 2010, the PW attempted to get the first child from the DH. However, the DH refused to comply with the court order, and the DH and his mother, Kamalam a/p Vengadsalam, were aggressive towards the PW. In view of that, the PW lodged a police report (exh. SC1 in encl. 32);

(c) after that, the PW, through her former solicitors, Messrs Nagarajan Peri & Co, sent a covering letter dated 17 June 2010 together with a copy of the sealed court order to the DH by post on 18 June 2010 (exh. SC2 in encl. 32);

(d) the PW, through Messrs Nagarajan Peri & Co, then filed a summons in chambers ("SIC") dated 18 June 2010 for leave to commence committal proceedings against the DH. However, the SIC was later withdrawn on 29 July 2010

because the papers were not in order and not in compliance with O. 52 r. 2 of the Rules of the High Court 1980 ("the RHC");

(e) after that, the PW, through her new solicitors, Messrs SS Ruban & Associates, served a copy of two letters dated 27 January 2011 and 25 May 2011 (exh. SC3 in encl. 32) to the DH requesting the DH to comply with the court order dated 31 March 2010. The DH was requested to hand over the first child to the PW within seven days from the date of the letter failing which the PW would take action for committal proceedings against the DH;

(f) again by a letter dated 1 July 2011 the PW's solicitors enclosed the court order dated 31 March 2010 and requested the DH's solicitors to advise the DH to comply with the court order;

(g) after that, the PW instructed Messrs SS Ruban & Associates to file for committal proceedings against the DH.

[14] In para. 4 of the DH's affidavit balasan 1, the DH admitted that he intentionally did not hand over the first child to the PW because of her conduct in leaving the matrimonial home. This is a clear admission by the DH of his non-compliance with the court order. However, this reason given by the DH is only relevant to the consideration of the court for the decision for encl. 1, ie, the court order dated 31 March 2010, but not for the consideration of this application in encl. 26.

[15] From the evidence, it is clear that the DH intentionally refused to comply with the court order dated 31 March 2010 even until the day of hearing of his application for variation of the same court order. He who comes to court must come with clean hands. The DH could not show that he had complied with the court order dated 31 March 2010. He is in contempt of court, and he should not be heard (see the Supreme Court case of *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210, *Legasri Purana Chandran v. Sreepathy Ganapathy Krishnan Iyer* [2010] 8 CLJ 208 and *Low Swee Siong v. Tan Siew Siew* [2011] 9 CLJ 536). On this issue alone, his application ought to be dismissed with costs.

[16] Notwithstanding the issue of the DH's contempt of the court order, even after considering the merits of his application, I find that there are no merits at all.

[17] The DH went on the basis that in the first place custody should not have been given to the PW. He stated the first child has always been taken care of by him and his mother. The first child is now happily settled and going to kindergarten, and it would be traumatic to uproot her and give her to the PW. In my opinion, these reasons and the relevant evidence had already been considered by the court at the time when the court decided on encl. 1 on 31 March 2010 and gave custody of both children to the PW. The DH was then duly represented by legal counsel and yet the DH chose not to appeal that decision.

[18] The DH cannot be allowed to take the law into his own hands by deciding not to comply with the court order dated 31 March 2010 and continue to be in blatant disregard of the court order, and keep the first child for about one and a half years, and then come to court at his own convenience to vary the court order.

[19] It is very obvious that the DH initiated the application for variation in view of the PW's actions in taking committal proceedings against him.

[20] This court is of the view that the paramount consideration is the welfare of the child (see s. 88(2) of the LRA). It is for the welfare of this first child that she be taken care of by her own mother ie, the PW, rather than by her paternal grandmother.

[21] Section 88(3) and (4) of the LRA provide as follows:

> (3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.
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> (4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently.

[22] The DH has not rebutted the rebuttable presumption in s. 88(3) of the LRA that the first child, who is five years old, and therefore below the age of seven years, should be with her mother.

[23] There is no cogent evidence adduced by the DH to prove that the PW is an unfit mother. It is for the welfare of the first child (now five years old) to be under the custody of her mother, and also to be with her younger sister (now four years old) who is now with the mother. It is not for the welfare of both children to be separated from each other and from the mother since both children are below seven years old. The two children have been separated since 3 November 2008. It is more feasible for both young girls to be brought up together by their own mother. The DH's mother, who looked after the first child before this, is already 60 years old. A paternal grandmother's love and care of the first child can never be the same or more superior to that which can be given by a mother who has not been proven to be unfit in any manner whatsoever thus far.

[24] Finally, it must be noted that the PW is still the wife of the DH. Both parties are still married, and not divorced yet.

[25] Based on the above reasons, I therefore ordered accordingly.

[26] I am of the view that the costs of RM1,500 to be paid by the DH to the PW within 14 days from the date of the court order is reasonable and fair, given the affidavits and written submissions that had to be filed.